

**SENTENCING — Rule 17.4(g) — Defendant is entitled to automatic change of judge if the sentencing judge has already received the presentence report when the defendant withdraws from the plea or the trial court rejects the plea**

**Revised 11/2009**

When a defendant has entered a guilty plea but later withdraws from the plea, or when the trial court rejects the plea, the defendant is entitled to an automatic change of judge if the sentencing judge has already received the presentence report prepared under Rule 26.4. Rule 17.4(g) provides :

**g. Automatic Change of Judge.** If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted.

In *Chavez v. Superior Court*, 181 Ariz. 93, 94-95, 887 P.2d 623, 624-25 (App. 1994), the court of appeals explained Rule 17.4(g)'s purpose by quoting from *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969):

Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the ex parte introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report. No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 [of the Federal Rules] intended to avoid. Although the judge may have that information at his disposal in order to give a defendant a sentence suited to his particular character and potential for rehabilitation,

there is no reason for him to see the document until the occasion to sentence arises, and under the rule he must not do so.

*Gregg*, 394 U.S. at 492, 89 S.Ct. at 1137. The court of appeals concluded that the rationale set forth in *Gregg* required the Court to construe Rule 17.4(g) to further its purpose of preventing possible prejudice from premature submission of the presentence report. Whether the trial court rejects a plea or a defendant withdraws from a plea before the trial court accepts it, the trial judge may be prejudiced against the defendant by examining the presentence report.

"Therefore, assuming that the presentence report has been submitted, Rule 17.4(g) entitles a defendant to a change of judge if the defendant withdraws from the plea prior to its acceptance pursuant to Rule 17.4(b)." *Chavez*, 181 Ariz. at 95, 887 P.2d at 625.